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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1422

THE CINCINNATI ENQUIRER, INC. and AMERICAN FINANCIAL CORPORATION,
Petitioners,

v.

JEAN WHITEHOUSE RAMEY; ANGIOLINA MORELLI; ALBERT HARRIS; THE E. W. SCRIPPS COMPANY, THE SCRIPPS-HOWARD INVESTMENT COMPANY, and JACK R. HOWARD; and CECIL F. SCHOEN, a.k.a. CECILE F. SCHOEN,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION JEAN WHITEHOUSE RAMEY, ANGIOLINA MORELLI AND ALBERT HARRIS

STATEMENT OF THE CASE

The District Court, in these consolidated derivative shareholders' actions, awarded total attorneys' fees of $865,000 and costs, and allocated payment of this total between The Cincinnati Enquirer, Inc. ("Enquirer") the corporation on whose behalf the suits were brought de-

rivatively, and its own minority and majority shareholders. The Court of Appeals, in its opinion now reported as *Ramey* v. *Cincinnati Enquirer, Inc.*, 508 F 2d 1188 (6th Cir. 1974), vacated the award of attorney fees insofar as it made such allocation and found that the entire fee (which was modified downward to $750,000 by elimination of prejudgment interest of $115,000) was to be paid by the Enquirer Corporation. Petitioners complain that this decision resulted in the wrong party paying the award.

ARGUMENT

This Court has just concluded a most extensive reexamination and redefinition of the rules governing the recovery of attorneys' fees by a prevailing party, in the exhaustive decision of *Alyeska Pipeline Service Company* v. *The Wilderness Society, et al.*, — U.S. —, 43 L.W. 4561, (May 12, 1975).

No reason has been advanced by Petitioners for the need for any further inquiry by this Court into the rules and their exceptions so thoroughly analyzed in that decision. Every fact and every finding in the instant case falls easily into one or more of such rules and exceptions.

A brief analysis of the Petitioners' position will confirm this statement.

Petitioners urge that the Sixth Circuit improperly increased the award of attorneys' fees against the Enquirer Corporation on the basis of benefits received only by their codefendant, Scripps-Howard, and not by the Enquirer Corporation.

Petitioners have misstated both the facts presented to and the findings of the District Court and the Sixth Circuit.

They would have this Court believe that the District Court made a fragmented finding as to the relative benefits

accorded to each defendant, and that as to the Enquirer Corporation, such Court found the benefit to be based only on corporate therapeutics, with all the economic benefits being attributed to Scripps-Howard and the minority shareholders. They would also have this Court believe that the District Court established how much each defendant should pay in attorneys' fees commensurate with such fragmented benefits, and then added up these separate totals to reach the final award of $750,000.

A reading of the Trial Court's Opinion (App. 41a-63a) demonstrates clearly that the Court did not arrive at its fee award in this fashion.

Quite simply, the District Court first made a finding as to the total benefits accorded to the corporation by this litigation, secondly set the total fee award at $750,000, and thirdly, allocated part of these total fees to the codefendants on the basis of additional incidental benefits which it felt flowed to them as shareholders.

This is apparent from the Trial Court's Opinion. In discussing the benefits accorded the Enquirer Corporation, the Court stated:

> "As to economic benefit, while there is dispute, this much can be said. If the Enquirer had purchased the Scripps shares, that is, if the plan had not been restrained, the Enquirer would have paid out $17.5 million in principal and would have lost the income on investments owned by it which had to be liquidated to apply on the purchase price of the stock in the sum of $1,026,748. In addition, the Enquirer would have obligated itself to interest payment on the loan of $15,975,000, and dividend payments on preferred stock of $4,590,000, and payment of premiums on required preferred stock redemption of $600,000, which payments would have totaled $22,191,748, in addition to the $17.5 million in principal previously stated. Also, as to economic benefit, it can be said that the

corporation, as Mr. Goldman contended, received nothing for the $17.5 million it paid for its own stock, or would have paid. If the deal had gone through, the book value of the stock would have gone from plus to minus, and it is probable the market value would have gone way down, at least temporarily. *An incidental benefit conferred on the shareholders* was that in the time it took to litigate Scripps kept its option open, and along came the Blue Chip offer to all shareholders for $35 a share, and the AFC offer to all shareholders of $40 a share, the difference between $40 and $35 being about $2.5 million or more to Scripps alone.

"Nevertheless, in fixing the fee we have not gone on the assumption that there is an identifiable fund, such as the interest on the obligation to Prudential. We have concluded that as far as economic benefit and other ways this case is unique, and, while we conclude that a significant service was performed by the applicants, *and there is strong evidence of economic benefit, especially in the testimony of Mr. Sawyer and Mr. McGrath, we cannot put a figure on it, though we can say it is substantial.*" (App. 54a) (Emphasis added.)

In fixing the amount of the total fee, the District Court made two telling observations about the role of the Petitioners:

"In fixing the amount of the award now the Court must also take into account the fact that it should have been fixed sixteen months ago, *and would have been but for the fact that the Enquirer's application to have Scripps pay part or all of the fee was delayed* and much time was taken to try to get the matter settled." (Emphasis added)

* * *

"AFC bought the Enquirer aware of and without protecting itself by an indemnity agreement from having to pay this fee." (App. 57a)

The District Court then stated:

> "From all the foregoing (discussion of economic benefit) it is clear that the attorneys (in the consolidated cases alone) have made a strong case to justify their request for $1.75 million in fees." (App. 55a)
>
> • • •
>
> "The Court concludes that the fee request should be cut and fees in the Enquirer case should be in the amount of $865,000 (including $115,000 prejudgment interest)." (App. 57a)
>
> • • •
>
> "This is the total fee in all the cases." (App. 58a)

Thus the District Court first found that the benefit of the services rendered by plaintiffs' counsel was substantial to the corporation and then established the amount of the fee based thereon. Only at the end of its decision did that Court allocate part of the fee to the shareholders, because they had received these additional incidental benefits. The fact that the District Court first established the amount of fee based on benefit to the corporation is corroborated by the District Court's assessing pre-judgment interest (which was eliminated by the Court of Appeals) against the Enquirer, (57a-58a):

> "The Court concludes that the fee request should be cut and fees in the Enquirer case should be in the amount of $865,000. Of that amount $115,000 is included because in the Court's view the fee should have been fixed almost two years ago at $750,000, and $115,000 should be allowed *because AFC and Enquirer have had use of that amount of money for this period, and their own representative testified that AFC would have made almost twice that amount on that amount of capital.*" (Emphasis added)

An examination of the Sixth Circuit's Opinion (App.

15a-36a) also demonstrates that the Appellate Court did not believe that the District Court arrived at either the benefits accorded or the fees awarded by the convoluted method suggested by Petitioners. That Court held, after reviewing the very language above quoted from the District Court's Opinion regarding corporate benefits:

> "On the record before us, we cannot hold clearly erroneous the findings of the District Court that the plaintiffs' suits resulted in a substantial benefit to the Enquirer. Fed. R. Civ. P. 52a." (App. 25a)

Discussing the amount of the total fees, the Sixth Circuit stated:

> "As we have pointed out, the District Judge found that defendants' benefit from the litigation was substantial. He did not pin a specific figure upon the benefit, but he had before him testimony that would have allowed a finding of between $7,500,000 and $17,500,000. We find no abuse of discretion in the District Court's award of the sum total of fees." (App. 31a)

In discussing the question of who should pay such total fees, the Court succinctly stated its position:

> "Incidental benefits to Scripps or minority shareholders, in the absence of an adjudication of fraud or misconduct on their part, does not justify a judgment against them for any part of the attorneys' fees.
>
> "Accordingly, the judgment of the District Court filed October 10, 1973, is vacated insofar as it awards any part of the attorneys' fees therein adjudicated to be paid by any party other than The Cincinnati Enquirer, Inc." (App. 35a)

It is apparent from the Sixth Circuit's Opinion that that Court did not consider that its decision increased the fee

award against the Enquirer Corporation with no commensurate finding of similar increased benefits, but quite simply ruled that the District Court was correct in its findings of the total value of the benefits accorded to the corporation and the total fees to be awarded based thereon, but should not have attempted to allocate any part of these fees directly to the defendant-shareholders, on the basis of additional incidental benefits flowing to them, because in a derivative action the corporate alone is liable for all such fees. This position is correct. See *Alyeska Pipeline Service Company* v. *The Wilderness Society*, supra.

Petitioners, by their second question presented, have tried to engraft a new exception to the rule governing the award of attorney fees.

As stated in the Sixth Circuit opinion, the general rule is:

> "The obligation to reimburse a shareholder who brings a successful derivative suit is an obligation of the corporation." (App. 34a)

An exception to this rule of payment by the corporation, rather than by its shareholders or other defendants occurs only where such other persons have been found to have acted "fraudulently, or in bad faith, vexatiously, wantonly, or for oppressive reasons". *Hall* v. *Cole*, 412 U.S. 1, 5 (1973).

This exception does not apply in this case, for the District Court made a specific finding that there was no bad faith on the part of the Scripps Group. (App. 62a-63a)

Petitioners have urged a new exception to this admittedly inapposite exception, to-wit, in those cases where, it is alleged, the codefendant shareholder has received sepa-

rate and distinct benefits by taking action on its part to moot the litigation, part or all of the award of attorney fees should be assessed against such entity.

First of all, Scripps-Howard did not unilaterally moot this litigation. Plaintiffs' success in showing the invalidity of the contract and their injunction in stopping the transaction were necessary prerequisites for Scripps-Howard to have the alternative of accepting an offer to all shareholders. Further, plaintiffs' success in the trial court dissuaded the Enquirer's management and directors from appealing the Scripps-Howard decision to accept the new alternative. Finally, petitioners have cited no authority for this unique theory, other than the ability of equity to do justice. A close reading of the *Alyeska* case, discloses no equitable need to extend the rules governing such awards to this length.

Attached as an Appendix to this Brief is an Exhibit showing awards of fees for successful plaintiffs as related to benefits accorded corporations in similar reported and unreported derivative suits. That exhibit patently shows the reasonableness of the fees in this case and the propriety of their assessment against this corporation.

CONCLUSION

Petitioners have raised no novel or undecided legal issues for consideration by this Court, but quite simply have complained of the outcome of a simple factual question, was the Corporation benefited by this derivative litigation? Both the District Court and the Sixth Circuit found that the Corporation was substantially benefited, and awarded the total legal fees to Respondents based upon such benefits.

At no time in either question presented does Petitioner complain that the total legal fees awarded to plaintiffs' counsel are excessive, or not well founded under the facts of the case. This Court has scrupulously followed the rule that the Court below should have considerable latitude of discretion on the subject of such fee awards, since it has far better means of knowing what is just and reasonable than an appellate court can have. This is just such a case.

No amount of skillful camouflage can disguise the fact that Petitioners have shown no reason why this Court should exercise its sound judicial discretion to entertain this case.

Respectfully submitted,

DOUGLAS G. COLE
ARNOLD MORELLI
IRVING HARRIS

Counsel for Respondents

APPENDIX

REPORTED CASES

Case	Benefit	Fee	Percentage
1. *Ripley* v. *Int'l Ry.*, 16 App. Div. 2d 260, 227 N.Y.S. 2d 64 (1962)	$ 8,000,000+ 7,500,000 Future Benefits	$2,104,900	20% + $104,900
2. *Zenn* v. *Anzalone*, 46 Misc. 2d 378, 259 N.Y.S. 2d 747 (Sup. Ct. 1965)	3,300,000+ Intangible Benefits	1,876,000	20
3. *Gerstle* v. *Gamble-Skogmo, Inc.*, 74 CCH Par. 94195 (E.D.N.Y. 1973)	12,127,751	1,600,000	18.7
4. *Newmark* v. *RKO General, Inc.*, 332 F. Supp. 161 (S.D.N.Y. 1971)	7,920,681	750,000	9.4

Case	Benefit	Fee	Percentage
5. *Newman* v. *Stein*, 58 F.R.D. 540 (S.D.N.Y. 1973)	Substantial benefits estimated to be at least $3,000,000	750,000	25
6. *In Re Four Seasons Securities Laws Litigation*, 73 CCH Par. 94052 (D.C. Okla 1973)	7,000,000	725,000	10.4
7. *Percodini* v. *Riker-Maxon Corp.*, 72 CCH Par. 93337 (S.D.N.Y. 1972)	3,200,000	650,000 (25% taken in stock)	20
8. *Milstein* v. *Werner*, 58 F.R.D. 544 (S.D.N.Y. 1973)	No immediate fixed, but $3,297,000 in intangible future benefits	300,000 now plus up to 200,000 more	15

Case	Benefit	Fee	Percentage
9. *Perlman* v. *Feldman*, 160 F. Supp. 310 (D. Conn. 1958)	1,150,000	450,000	39
10. *Quirke* v. *Chessie Corp.*, 74 CCH Security Law Reporter, Par. 94346 (S.D.N.Y. 1974)	2,444,109	440,000	18
11. *Schlusselberg* v. *Keystone Custodian Funds, Inc.*, 73 CCH 93901 (S.D.N.Y. 1973)	1,750,000+ Future Benefits	405,000	27%
12. *White* v. *Averbach*, 73 CCH Par. 94117 (S.D.N.Y. 1973)	1,000,000+ 1,000,000 in Future Benefits	300,000	15
13. *The Herald Co.* v. *Bonfils*, 315 F. Supp. 497 (D. Col. 1970)	6,429,299	300,000	4+
14. *Epstein* v. *Weiss*, 1971 CCH Fed. Sec. L. Rep. Par. 19238 (E.D. La. 1970)	1,000,000	300,000	30

Case	Benefit	Fee	Percentage
15. *Fox* v. *Glickman Corp.*, 253 F. Supp. 1005 (S.D.N.Y. 1966)	1,825,000	285,000	16
16. *Green* v. *Transitron Electronic Corp.* 326 F. 2d 492 (1st Cir. 1964)	5,300,000	266,500	5
17. *Rosenfeld* v. *Black*, 56 F.R.D. 604 (S.D.N.Y. 1972)	1,000,000	250,000	25
18. *Maggiore* v. *Bradford*, 310 F. 2d 519 (6th Cir. 1962)	2,700,000	235,000	8.7
19. *Newman* v. *Electronic Specialty Co.*, 1971 CCH Fed. Sec. L. Rep. Par. 2955 (N.D. Ill. 1971)	1,200,000	240,000	20
20. *National Bankers Life Ins. Co.* v. *Rosson*, 400 S. W. 2d 366 (Tex. Civ. App. 1966)	1,025,000	200,000	19

Case		Benefit	Fee	Percentage
21.	*Siegel* v. *Realty Equities Corp. of N.Y.*, 73 CCH, Par. 94102 (S.D.N.Y. 1973)	625,000	160,000	26
22.	*Derdiarian* v. *Futterman Corp.*, 254 F. Supp. 617 (S.D.N.Y. 1966)	1,200,000	152,500	12.5
23.	*Stull* v. *Kaymarq Consol. Corp.*, 1970 CCH Fed. Sec. L. Rep. Par. 92508 (S.D.N.Y. 1969)	440,000	142,000	32
24.	*Berger* v. *Amana Society*, 257 Iowa 956, 135 N.W. 2d 618 (1965)	5,000,000	125,000	2.5
25.	*Krinsky* v. *Helfand*, 38 Del. Ch. 553, 156 A. 2d 90 (1959)	500,000	100,000	20
26.	*Pergament* v. *Kaiser-Frazer Corp.*, 224 F. 2d 80 (6th Cir. 1955)	500,000	100,000	20

Case		Benefit	Fee	Percentage
27.	*Angoff* v. *Goldfine*, 270 F. 2d 185 (1st Cir. 1959)	662,500	88,000	(Descending percentage 25% down)
28.	*Whittemore* v. *Sun Oil Co.*, 58 F.R.D. 624 (S.D.N.Y. 1973)	"Modest Benefit"	80,000	?
29.	*Volvovitz* v. *VTR, Inc.*, 1971 CCH Fed. Sec. L. Rep. Par. 93292 (S.D.N.Y. 1971)	400,000	75,000	18 3/4
30.	*Fletcher* v. *A. J. Industries, Inc.*, 266 Cal. App. 2d, 72 Cal. Reptr. 146 (1968)	200,000	64,784	32
31.	*Katz* v. *E. L. I. Computex, Inc.*, 1971 CCH Fed. Sec. L. Rep. Par. 92994 (1971)	200,000	30,000	15
32.	*Mardel Sec., Inc.* v. *Alexandria Gazette Corp.*, 278 F. Supp. 1010 (E.D. Va. 1967)	125,000	25,000	20

Case	Benefit	Fee	Percentage
33. *Sarner* v. *Sarner*, 38 N.J. 463, 185 A. 2d 851 (1962)	483,738	25,000	5
34. *Magida* v. *Continental Can Co.*, 176 F. Supp. 781 (S.D.N.Y. 1956)	47,000	12,000	25
35. *Alexander* v. *Lindsey*, 152 So. 2d 261 (La. Ct. App. 1963)	8,667	1,733	20

UNREPORTED CASES

Case	Benefit	Fee	Percentage
1. *Martin* v. *Ohio Cas. Ins. Co.*, Civ. No. 7245 (S.D. Ohio 1970)	$ 6,300,000	$ 630,000	10%
2. *Manacher* v. *Reynolds*, Del. Ch. Civil No. 1129 (May 26, 1961)	1,728,900	500,000	29
3. *Fisher* v. *Kletz*, N.Y.L.J. (S.D. N.Y., Dec. 9, 1971)	1,010,000	209,846	20.5
4. *Cole* v. *Union Bankers Life Ins. Co.*, Civil No. 9286 (N.D. Texas 1970)	600,000	200,000	33 1/3
5. *Zeitlin* v. *Bergen*, Civ. No. 66-4479 (S.D.N.Y., July 23, 1971)	800,000	190,000	23 3/4
6. *Loewi* v. *Fairchild-Hiller Corp.*, Civil No. 66-975 (E.D.N.Y. 1967)	600,000	180,000	30
7. *Jamison* v. *Barr*, Civil No. 69-2795 (S.D.N.Y. Oct. 1971)	600,000	175,000	29

Case		Benefit	Fee	Percentage
8.	*Schilkret* v. *Freeley,* (Sup. Ct. N.Y. Co. 1957)	300,000	113,750	37.5
9.	*Getz* v. *Baker,* Index No. 13445/57 (Sup. Ct. N.Y. Co. 1966)	400,000	100,000	25
10.	*Spirt* v. *Bechtel,* Civil No. 53-105 (S.D.N.Y. Oct. 4, 1959)	202,600	75,000	37
11.	*Levitt* v. *Johnson,* Civil No. 63-389-w (D. Mass., Mar. 22, 1966)	250,000	62,500	25
12.	*Franklin* v. *Blaylock,* Civil No. 62-4067 (S.D.N.Y. Nov. 20, 1964)	150,000	50,000	33 1/3
13.	*Blau* v. *Mission Corp.,* Civil No. 64-65 (S.D.N.Y. 1954)	70,400	35,000	49
14.	*Entel* v. *Guilden,* Civil No. 63-788 (S.D.N.Y. 1955)	120,000	32,000	26 3/5
15.	*Blay* v. *Kagan,* Civ. No. 66-4196 (S.D.N.Y. 1968)	28,001	10,000	35.7